Ng Wu Hong v Abraham Verghese a/l TV Abraham & Ors

HIGH COURT (KUCHING) — SUIT NO 22– 47 OF 2005 –11
HAMID SULTAN JC
29 JUNE 2007

Civil Procedure — Appeal — Appeal against decision of deputy registrar — Striking out — Whether plaintiff's action rightfully struck out

Civil Procedure — Striking out — Action — Principles of striking out — Whether plaintiff's action frivolous, vexatious or an abuse of the process of the court — Whether full trial warranted in light of issues raised

The appellant/plaintiff filed an appeal in respect of the decision of the learned deputy registrar in allowing the respondents/defendants' application to strike out the appellant's claim under O 18 r 19(a)(b) and/or (d) or O 92 r 4 of the Rules of High Court 1980 ('the RHC'), inter alia on the grounds that: (i) the defendants did not owe any duty of care to the plaintiff; (ii) the plaintiff's loss was not caused by the defendants; and (iii) the plaintiff's action was statute-barred. The facts leading to the filing of this action involved the plaintiff who was the chief executive officer and executive director of Sarawak Securities Sdn Bhd ('SSSB'). The defendants meanwhile, were the external auditors for SSSB. Based on the audit report prepared by the defendant's firm, the plaintiff accepted the financial state of affairs of SSSB as being in a healthy condition and allowed trading to continue normally. However, it was alleged by the plaintiff that at the material time there was fraud committed by the employees of SSSB and the defendants were negligent in not discovering and disclosing them in the said report. In consequence of the defendants alleged negligence, SSSB lost RM56m and as a result thereof the plaintiff was asked to resign. Following the resignation, the plaintiff further alleged that he had suffered losses and damages and claimed a sum of RM41,408,000. At the hearing of this appeal, the appellant relied on several authorities and submitted on the principles of striking out. The appellant also submitted that (a) there was now an established line of cases where the courts have held that contractual obligations can generate a tortuous duty of care towards a third party who was not a party to the contract; and (b) the limitation period was six years and that the claim was not time barred. In reply, the defendants submitted that (a) they owe a duty of care to SSSB but not the plaintiff and relied on various cases to support this proposition; and

(b) the action was time barred pursuant to Item 19 of the Schedule to the Limitation Ordinance (Sarawak Cap. 49).

Held, allowing appeal with costs:

(1) In consequence of the close proximity of the position of the plaintiff, SSSB and the defendants, an action in tort related to contract could rightly be framed but whether it could succeed, depended on the facts and evidence adduced and could not be summarily determined. Thus, a full trial was necessary to determine the issues (see para 7).

(2) The issue of limitation was also interlinked to the plaintiff's cause of action and it would be prudent not to dismiss the plaintiff's claim without giving the opportunity for the plaintiff to establish his case by adducing evidence at a full trial (see para 8).

(3) For reasons stated above, the plaintiff's action as pleaded was not frivolous, vexatious or an abuse of the process of court (see para 10).

Perayu/plaintif memfailkan satu rayuan berkenaan dengan keputusan timbalan pendaftar terpelajar yang membenarkan permohonan responden-reponden/defendan-defendan untuk membatalkan tuntutan perayu di bawah Aturan 18 kaedah 19(a)(b) dan/atau (d) atau A 92 k 4 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), antara lain atas alasan-alasan bahawa (i) defendan-defendan tidak terhutang sebarang kewajipan berhati-hati kepada plaintif; (ii) kerugian plaintif bukan disebabkan oleh defendan-defendan; dan (iii) tuntutan plaintif adalah dihalang oleh statut. Fakta-fakta yang membawa kepada pemfailan tindakan ini melibatkan plaintif yang merupakan ketua pegawai eksekutif dan pengarah eksekutif Sarawak Securities Sdn Bhd (SSSB). Defendan-defendan sementara itu, adalah auditor luaran kepada SSSB. Berdasarkan kepada laporan audit yang disediakan oleh firma defendan, plaintif telah menerima hal ehwal kewangan SSSB dalam keadaan yang meyakinkan dan membenarkan perniagaan dijalankan seperti biasa. Walaubagaimanapun, plaintif menyatakan bahawa pada setiap masa yang material terdapat penipuan yang dilakukan oleh pekerja-pekerja SSSB dan defendan-defendan telah cuai kerana tidak dapat menemui dan mendedahkan kegiatan mereka dalam laporan tersebut. Berikutan kecuaian defendan, SSSB kerugian RM56 juta dan kesannya plaintif telah dipaksa meletak jawatan. Berikutan daripada perletakkan jawatannya, plaintif seterusnya mengatakan bahawa beliau telah mengalami kerugian dan kerosakkan-kerosakkan dan telah menuntut sejumlah RM41,408,000. Semasa pendengaran rayuan ini, perayu bergantung kepada beberapa otoriti dan menghujahkan berkenaan prinsip-prinsip pembatalan. Perayu juga menghujahkan bahawa; (a) sekarang

terdapat barisan kes-kes yang terkemuka di mana mahkamah-mahkamah telah memutuskan bahawa kewajipan kontraktual boleh merangsang kewajipan tort terhadap pihak ketiga yang bukan pihak kepada kontrak; dan (b) tempoh had masa adalah enam tahun dan bahawa tuntutan tidak dihadkan oleh masa. Sebagai balasan, defendan-defendan menghujahkan bahawa (a) mereka berhutang kewajipan berjaga-jaga kepada SSSB dan bukan kepada plaintif dan bergantung kepada beberapa kes untuk menyokong kenyataannya; dan (b) tindakan adalah dihadkan oleh masa menurut kepada Butiran 19 Jadual kepada Ordinans Hadmasa (Sarawak Cap 49).

Diputuskan, membenarkan rayuan dengan kos:

(1) Berikutan kedududukan yang amat rapat plaintif, SSSB dan defendan-defendan, satu tindakan dalam tort berkenaan dengan kontrak boleh dirangka dengan betul sama ada ia akan berjaya, bergantung kepada fakta-fakta dan keterangan-keterangan yang dikemukakan dan tidak boleh diputuskan secara terus. Oleh yang demikian, perbicaraan penuh adalah perlu untuk menentukan isu-isu (lihat perenggan 7).

(2) Isu hadmasa adalah bersangkut-paut dengan kausa tindakan plaintif dan ia adalah bijak untuk tidak menolak tuntutan plaintif tanpa memberikan peluang kepada plaintif untuk mengemukakan kesnya dengan memberikan keterangan semasa perbicaraan penuh (lihat perenggan 8).

(3) Untuk sebab-sebab yang dinyatakan di atas, tuntutan plaintif sebagaimana diplidkan adalah tidak remeh, menyusahkan atau merupakan penyalahgunaan proses mahkamah (lihat perenggan 10).

Notes

For a case on appeal against decision of deputy registrar, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 673.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1 (refd)

Attorney General of the Duchy of Lancaster v London & North Western Railway Co (1892) 3 Ch 277 (refd)

Banque Bruxells S.A. v Eagle Star [1997] AC 91 (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605 (refd)

Castro v Murray (1875) 10 Ex 213 (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors [1998] 1 SLR 374 (refd)

Goh Koon Suan v Heng Gek Kiau [1991] 2 MLJ 505 (refd)
Ikumene Singapore Pte Ltd v Leong Chee Leng [1993] 3 SLR 24 (refd)
Malayan Banking Berhad v Gan Kong Yam [1972] 1 MLJ 32 (refd)
New Straits Times Malaysia Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 227 (refd)
Pertamina v Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)
Ross v Caunters [1979] 3 All E.R. 580 (refd)
Smith v Eric S Bush [1989] 2 All ER 514 (refd)
Te Cheng Hoi v Peh Im Kweng [1994] 2 MLJ 547 (refd)
Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & The Hong Jet [2006] 7 CLJ 541 (refd)
The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd [2006] 1 CLJ 259 (refd)
RS Krishnan a/l RS Naidu v Eric Soon Boo Teck [2004] 1 MLJ 252 (refd)

Legislation referred to

O 18 r 19(a), (b), (d), O 92 r 4 Rules of the High Court 1980

Mekanda Singh Sandhu (Satinder Singh Sandhu with him) (Sandhu & Co) for the plaintiff.
James Lo (George Lo & Partners) for the defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant's appeal of the decision of the learned deputy registrar who allowed the respondents's application to strike out the appellant's claim under O 18 r 19(a)(b) and/or (d) or O 92 r 4 of the Rules of High Court 1980 (RHC 1980) on grounds:

(i) the defendants did not owe any duty of care to the plaintiff;

(ii) the plaintiff's loss was not caused by the defendants; and

(iii) the plaintiff's action is statute-barred.

[2] The plaintiff in this case was chief executive officer and executive director of Sarawak Securities Sdn Bhd (SSSB). The defendants were external auditors for SSSB. Based on the audit report, the plaintiff accepted the financial state of affairs of SSSB as being in a healthy condition and allowed trading to continue normally. The plaintiff alleges that at the material time there was fraud committed by the employees of the SSSB and the defendants were negligent in not discovering and disclosing them in the said report. In consequence, SSSB lost RM56m and as a result the plaintiff was asked to resign. In consequence, the plaintiff says he has suffered loss and damages and

claims a sum of RM41,408,000.00. The particulars are as follows:

(a) annual basic salary (RM800,000.00 x 13 years) RM10,400,000.00;

(b) bonus (RM1,500,000 x 13 years) RM 19,500,000.00;

(c) share option (5 million option on CMS capital shares at RM1 per share taken at a tradable book value) RM 5,000,000.00;

(d) car and driver (RM 36,000 x 13 years) RM468,000.00;

(e) overseas travel (RM20,000 x 13 years) RM260,000.00;

(f) housing (RM60,000 x 13 years) RM780,000.00;

(g) special damages - RM 5,000,000.00.

Total: RM 41,408,000.00

[3] The appellant and the respondents rely on the following authorities, namely:

(i) *Abdul Rahim Abdul Hamid & ors v. Perdana Merchant Bankers Bhd & ors* [2000] 2 CLJ 457;

(ii) The *Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 CLJ 259;

(iii) *RS Krishnan a/l RS Naidu v Eric Soon Boo Teck* [2004] 1 MLJ 252;

(iv) *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374;

(v) *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & The Hong Jet* [2006] 7 CLJ 541;

(vi) *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558;

(vii) *Ross v Caunters* [1979] 3 All ER 580

(viii) *Smith v Eric S Bush* [1989] 2 All ER 514

(ix) *Bryan v Maloney* [1991] 182 CLR 609;

(x) *National Bank, Lahore v Sohan Lal AIR* [1965] SC 1663;

(xi) *Abdul Jalal Ahmad & Ors v Pegawai Pemegang Harta Cawangan Negeri Sembilan & Ors* [2004] 7 CLJ 293;

(xii) *Rajoo a/l Selvappan & Ors v Abdul Bhari s/o Kader Ibrahim Ors* [2005] 6 MLJ 444;

(xiiii) *Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd* [2004] 4 CLJ 464;

(xiv) *Spencer Bower, Turner and Handley on The Doctrine of Res Judicata (3rd Ed);*

(xv) *National Bank of Lahore v Sohan Lal Saigal AIR* [1965] SC 1663;

(xvi) *Caparo Industries plc v Dickman* [1990] 2 AC 605;

(xvii) *Yue Xiu Finance Co Ltd & Anor v Agnew & Ors* [1996] 2 HKC 122;

(xviii) *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 3 SLR 24;

(xix) *Re Queen Moat Houses* (2005) 1 BCLC 136;

(xx) *Banque Bruxelles S.A. v Eagle Star* [1997] AC 191;

(xxi) *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392;

(xxii) *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16;

(xxiii) *Malayan United Finance Bhd v Cheung Kong Plantation Sdn Bhd* [2000] 2 CLJ 601.

[4] On the principles of striking out, the appellant, inter alia, submits as follows:

(a) In *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1, the defendants had filed an application to strike out the writ and the statement of claim under O 18 r 19(a), (b) and (d) RHC 1980. In dealing with the application, the Court of Appeal re-visited the legal principles governing the striking out application and stated:

> In considering an application under O 18 r 19(1)(a), the court has to take into account the statement of claim on the face of it and no consideration whatsoever shall be paid to the evidence in the form of these affidavits. So long as the statement of claim discloses a reasonable cause of action, however weak the claim is, the claim cannot be struck off summarily.

The Court then proceeded to consider the approach in respect of the other limbs of the rule. At p 468, the Court of Appeal stated:

> In considering whether Carah's statement of claim is scandalous, frivolous or vexatious under O 18 r 19(1)(b), or is an abuse of the process of the court under O 18 r 19(1)(c) or under the inherent jurisdiction of the court under O 92 r 4, the court is entitled to look at the affidavit evidence and the exhibits. Looking at the above pleadings, and the lengthy affidavits and the various exhibits filed by Carah and the lenders, there is a serious conflict of material affidavit evidence which can only be resolved by subjecting the deponents to cross-examinations and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them.

A The court cannot conduct a trial on the silent cold-printed or typewritten words in the opposing affidavits where there is a serious dispute or conflict on material facts, a finding of which by the trial judge will have a decisive consequence on the case of the parties.

B (b) In *The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 CLJ 259, the Court of Appeal said at pp 266-268:

> An application to strike out an action under O 18 r 19 should not descend into a trial on affidavits. What the court is really concerned with is to determine whether the pleading discloses facts which merit
C a trial of the action. There is a surfeit of authorities on the point and I need only cite one. In *Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 the Supreme Court said this:
>
> The principles upon which the court acts in exercising its power under
D any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, and this summary procedure can only be adopted when it can be clearly seen
E that a claim or answer is on the face of it 'obviously unsustainable' ….

(c) In *RS Krishnan a/l RS Naidu v Eric Soon Boo Teck* [2004] 1 MLJ 252, the High Court opined:

> In this application, as the applicant/defendant is relying on limbs (b),
F (c) and (d), the legal burden is on the applicant/defendant to show that the statement of claim is scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or is an abuse of the process of the court. He must discharge this burden by affidavit evidence.

G (d) In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374, the Singapore Court of Appeal considered the meaning of the phrase 'abuse of the process of the Court' and stated:

H (e) In *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & The Hong Jet* [2006] 7 CLJ 541, Low Hop Bing J (as he then was) stated:

> I have on several occasions explained the ambit and purview of the
I words 'scandalous, frivolous or vexatious' in O 18 r 19(1)(b). Scandalous means wholly unnecessary or irrelevant while 'frivolous and vexatious' mean obviously unsustainable: see *Mohamed Nazri, Boey Ai Leng v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 and *Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors* [2003] 1 CLJ 767.

(f) In *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 the court opined:

> Relying on all these authorities, it would be appropriate to say that a case should only be struck out if it is obviously unsustainable. The root word here is not 'unsustainable' but rather 'obviously' which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law. In my judgment, these words cannot be read to mean that the court is to undertake, at this early stage, a detailed scrutiny of the documents and examine the evidence of each party to the dispute. To interpret it as such would be to go against the grain of the provisions of O 18 r 19(10) of the RHC.

[5] The defendants say that they owe a duty of care to SSSB but not the plaintiff and rely on various cases in support of this proposition and some of them are as follows:

(a) In *Caparo Industries Plc v Dickman* [1990] 2 AC 605, Lord Bridge opined:

> …the negligent failure of the auditor to discover and expose a misappropriation of funds by a director of the company, will be recouped by a claim against the auditors in the name of the company, not by the individual shareholders.

(b) In *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 3 SLR 24, the Court of Appeal stated:

> It seems to us that outside contractual of fiduciary relationship, for there to be a duty of care owing by one person to another to ensure the accuracy of any statement which that one party makes and which the other party may forseeably rely to his economic detriment, there must be that degree of proximity or special relationship between the two parties.

(c) In *Banque Bruxells S.A. v Eagle Star* [1997] AC 91, Lord Hoffimann opined:

> A plaintiff who sues for breach of a duty by law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by *Caparo Industries Plc v Dickman* [1990] 2 A.C 3605.

[6] Further, the plaintiff says that there is now an established line of cases where the courts have held that contractual obligation can generate a tortuous

duty of care towards third party not a party to the contract. Support for this proposition can be found in a number of cases, to mention a few are as follows:

(a) In *Ross v Caunters* [1979] 3 All E.R. 580, the plaintiff had been named as a beneficiary in a testator's will. The solicitors who drew the will failed to advise the testator that the attestation of the will by the plaintiff's spouse would invalidate the will. The plaintiff's husband attested the will. As a consequence, the gifts failed. The plaintiff brought the action claiming for damages in negligence for loss of the gifts under the will. The court held that the solicitors owed a duty of care to the plaintiff to exercise proper care in carrying out the instructions even though it was the testator who retained the solicitors to draw up the will.

(b) In *Smith v Eric S Bush* [1989] 2 All E.R. 514, the court held that a person who values a house for the purpose of a mortgage under a contract with the building society nevertheless owes a duty of care to purchasers of a house who forseeably rely on the valuation. No privity of contract existed between the valuer and the purchaser.

[7] I have read the relevant application, affidavits and submission of the parties herein in detail. The plaintiff's central allegation to maintain a cause of action is that because of the defendants' contract with SSSB, the defendants voluntarily assumed a duty of care to the plaintiff. The defendants maintain that they owed a duty of care to SSSB but not the plaintiff. Ordinarily I will have thought the defendants' proposition is right in law. However, in consequence of the close proximity of the position of the plaintiff, SSSB and the defendants, an action in tort related to contract can rightly be framed but whether it can succeed, depends on the facts and evidence adduced and cannot be summarily determined. Thus, a full trial is necessary to determine the issues.

[8] On the issue of limitation, the plaintiff's anchor the argument that his claim falls within the Limitation Ordinance the ground that an action based on malfeasance dependent on a contract, the limitation period is six years and the claim is not time barred. However, the defendant says the action is time barred pursuant to Item 19 of the Schedule to Limitation Ordinance (Sarawak Cap. 49) under which the prescribed period for tortuous claims, whether in the alleged form of malfeasance, misfeasance or nonfeasance, independent of contract, is two years only. In my view the issue of limitation is also interlinked to the plaintiff's cause of action and it will be prudent not to dismiss the plaintiff's claim without giving the opportunity for the plaintiff to establish his case by adducing evidence at a full trial.

[9] On the facts of this case, I do not think an application for striking out ought to be allowed. The principles relating to striking out pleadings are well settled and can be summarised as follows: A

(a) The court may, at any stage of the proceedings, order to strike out or amend any matter in any pleading which may be unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the action, or which is otherwise an abuse of the process of court. The rule is silent as to when the application must be made. However, case laws say that the application should be made as soon as possible. B C

(b) In *Te Cheng Hoi v Peh Im Kweng* [1994] 2 MLJ 547, it was stated that for practical reasons and not as a matter of principle, the power to dismiss should not be exercised during the limitation period of the cause of action as the plaintiff may then file a fresh action immediately following such dismissal. D

(c) Based on the RHC, it would appear that the court always has the inherent jurisdiction to strike out any pleadings or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of court (O 92 r 4 of the RHC). In *Davy v Garrett* (1877) Ch D 473, it was emphasised that the Court of Appeal will not readily interfere with the discretion of the court of first instance in a matter of procedure. In this case, in the opinion of the Court of Appeal, the statement of claim was calculated to embarrass the defendants by reason of stating immaterial facts and setting out at great length documents which could not be material, except as evidence by way of admission. The court ordered it to be struck out even though a motion for that purpose had been dismissed with costs by the court below. E F

(d) Under O 18 r 19 of the RHC, a pleading may be struck out on grounds: G

(a) it discloses no reasonable cause of action or defence; or

(b) it scandalous, frivolous or vexatious; or H

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of court.

All the above grounds arguably will appear to overlap (see *Tunku Abdul Rahman Putra Al-Haj & Ors v Dato Seri Dr Mahathir Mohamed* [1989] 1 MLJ 48). Under this order the court is also empowered to make such other order on such term as it thinks just. This may include an order that the action be stayed or dismissed or judgment be entered (see *Re Allapitchay Rawther, deceased* [1949] MLJ 60). I

(e) As a general rule it is only in plain and obvious cases that recourse should be had to this summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out a pleading. Where the allegation is that the statement of claim discloses no reasonable cause of action, it must be tried upon the allegations contained in the pleading, and evidence in support of the applicant's case is not admissible. However, with regard to the second limb of the rule relating to frivolous and vexatious action, the inherent jurisdiction of the court remains unaffected. Affidavits are admissible not by virtue of the rule, but by virtue of the general jurisdiction of the court. The court is entitled to look at the affidavits as to the history of the matter and if in that light, the action was vexatious or frivolous, the pleading could be struck out and the action dismissed.

(f) In *Pertamina v Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136, the court stated that only in plain and obvious cases should recourse be had to the summary process under O 18 r 19 of the RHC. It cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. As long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out.

(g) In *New Straits Times Malaysia Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 227, Mohamed Azmi FJ (as His Lordship then was) stated:

> It is therefore clear law that in an application to strike out pleadings under O 18 r 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable....

(h) In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution (per Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing*). In *Lawrence v Norreys,* Lord Herschell said words to the same effect that 'It cannot be doubted that the Court has an

inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

(i) Frivolous or vexatious action or statement is generally referred to a groundless action or statement with no prospect of success. It is often raised to embarrass or annoy the other party to the action (see *Attorney General of the Duchy of Lancaster v London & North Western Railway Co* (1892) 3 Ch. 277). In *Goh Koon Suan v Heng Gek Kiau* [1991] 2 MLJ 505, the court stated that an action is 'vexatious' if the party bringing it is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. In the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32, the plaintiff applied to strike out certain paragraph of the defence on the ground that it discloses no reasonable defence or as being frivolous or vexatious or tending to delay the fair trial of this action. HRH Raja Azlan Shah J (as HRH then was) observed:

> No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no legitimate amendment can save it from being demurrable: per Chitty J in *Republic of Peru v Peruvian Guano Co*. Then again, frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable (see *Attorney General or the Duchy of Lancaster v London and North Western Railway Co*).

(j) Abuse generally means everything, which is contrary to good order established by usage. Abuse of process of court refers to situation where the court's process is used for unlawful object and not for the actual purpose intended to achieve justice (see *Castro v Murray* (1875) 10 Ex 213).

[10] For reasons stated above, I am of the view that the plaintiff's action as pleaded is not frivolous, vexatious or an abuse of the process of court. In consequence, I allow the plaintiff's appeal with costs and direct the registrar to fix an early date for trial of this action. I hereby order so.
Appeal allowed with costs.

Reported by Eugene Daniel Louis